



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 5 OF 2009

KERIO VALLEY DEVELOPMENT AUTHORITY.....APPELLANT

VERSUS

AUGUSTINE M. SIWARESPONDENT

(Being Appeal against Judgment of Eldoret Chief Magistrate's Court Civil Case No. 620 of 2005

delivered on 9th December, 2003 by Hon. G.A. M'masi – Senior Resident Magistrate).

J U D G M E N T

This is an appeal from the decision of the Senior Resident Magistrate at Eldoret delivered on 9th December, 2008 in **Eldoret CMCC. No.620 of 2005** in which the plaintiff (herein the respondent) had sued the defendant (herein, the appellant) for Kshs.720,000/- inclusive of costs and interest of the suit.

It was averred by the plaintiff that the amount was the balance of consultancy fees due to him by the defendant to carry out a feasibility study of livestock development in West Pokot and Turkana sometimes in September 2003.

The plaintiff contended that despite several demands made to the defendant to pay the amount, the defendant adamantly refused to pay thereby leading to the institution of the suit in which he prayed for judgment for the amount. The defendant denied the claim and the allegation that it offered plaintiff consultancy services on livestock development in Turkana or West Pokot in September 2003.

The defendant also denied having contracted the plaintiff to carry out a feasibility of livestock

development in West Pokot and Turkana in the month of September, 2003 and prayed for the dismissal of the plaintiff's suit with costs.

After hearing both the plaintiff and the defendant, the learned trial magistrate entered judgment in favour of the plaintiff against the defendant for the claimed sum of Kshs.720,000/- together with costs of the suit and interest. Being dissatisfied with the said judgment, the defendant/appellant preferred eight grounds of appeal contained in the memorandum of appeal filed herein on 12th August, 2003.

The said grounds were argued on behalf of the appellant by learned counsel, **Mr. Ngala**, and were opposed on behalf of the respondent by the learned counsel, **Mr. Kathili**.

On ground one, the appellant submitted that the plaintiff's case was not proved on a balance of probabilities and that it was erroneous for the learned trial magistrate to give judgment to the plaintiff instead of dismissing the suit even though the internal memo (P.MFI 1) which the plaintiff relied upon to confirm that he had been engaged by the defendant was not for usage by a third party and did not carry legal consequences, neither was it capable of confirming rights and obligations to the parties.

Further, the internal memo did not give instructions for the engagement of the plaintiff and did not also specify the amount involved. The appellant said that there was an admission on the part of the plaintiff that he was not an expert in livestock and that he did not have any letter instructing him to engage in the material work at a fee of Kshs.720,000/-. Consequently, there was no proof that the plaintiff was entitled to the amount claimed.

On ground two, the appellant contended that the amount of Kshs.720,000/- was not proved and that it was not enough for a litigant to throw an amount at the court without proving it. In that regard, the appellant relied on the decision in the case of **Shaban v.s. City Council of Nairobi (1985)KLR 516**.

On ground three, the appellant submitted that the burden of proof was shifted to the appellant as it was held by the trial court that there was no written contract but the court alluded to an implied contract when it asked "if there was no written document, why did the defendant pay the plaintiff the night out allowance."

On ground four, the appellant submitted that it was erroneously for the learned trial magistrate to hold that there was an implied contract as there was no series of correspondence between the plaintiff and the defendant to imply the same. Further, PW1, DW1, and DW2 all agreed that no contract was executed.

On ground five, the appellant submitted that its submissions and authorities were not considered by the learned trial magistrate.

On ground six, the appellant submitted that the issue of public authority was raised and being a public authority under the State Corporations Act, its accounts required control and accountability and that its procurement of services had to be done in accordance with the Excheque and Audit Act and the Procurement Act which was not the case herein thereby disentitling the plaintiff of any amount claimed.

On ground seven, the appellant submitted that the plaintiff admitted that he was not a registered consultant. It was therefore erroneous for the learned trial magistrate to accept the plaintiff's suit whereas

there was no evidence that he was a consultant in the field for which he provided the alleged services.

On ground eight, the appellant submitted that the learned trial magistrate failed to consider the evidence by the defence witnesses (DW1 and DW2) who said that the project was undertaken by the defendant and not the plaintiff. They denied that the plaintiff gave any consultancy services and was paid Kshs.42,000/- ex-gratia payment for accompanying them (DW1 and DW2) to an assignment. The appellant urged this court to allow the appeal.

In response, the respondent submitted that the learned trial magistrate was entitled to make findings based on the pleadings and evidence before her and although the plaintiff exhibited ten exhibits, the defendant exhibited none. Further, the plaintiff's exhibit were not challenged. Plaintiff exhibit No. 9(a) was a register for consultancy fees payments, P.Ex. 9(b) gave the rates for the claim. None of the two documents was challenged by the defendant. The respondent submitted that he produced four reports which were admitted by the defendant and were passed over to the defendant's Managing Director. He also produced notes (P.Ex.4) taken by him while undertaking feasibility studies in the field. He was not an employee of the defendant yet accompanied various officers of the defendant to the field where he took notes.

The respondent contended that he proved his case within the standard required for civil cases and that it was acknowledged by the defendant that he was an expert who was to assist in the writing of quality proposals. The respondent went on to submit that it was conceded by DW2 who was in charge of the feasibility study that he (respondent) was entitled to payment for the work done. He (DW2) informed the court that there was an implied contract between him (respondent) and the defendant.

On the issue of procurement, the respondent contended that this was not pleaded and was not an issue in the trial court. The appellant was therefore introducing a new issue on appeal. The respondent contended that the burden of proof was not shifted to the appellant and that the learned trial magistrate considered and compared all the evidence before herself and arrived at her judgment. Further, there was no evidence to dispute the claimed consultancy rates. The respondent urge this court to dismiss the appeal with costs.

Having heard both sides, the role of this court is to reconsider the evidence afresh and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

In that regard, the plaintiff **Augustine Mika Siwa (PW1)** testified that he was a freelance community development consultant with a degree in Business Administration from Makerere University. He normally consulted on areas of community development. He was introduced to the defendant by a pastor Nicodemus Kebasa and met the defendant's senior planning officer **Fredrick Kimetto (DW2)**. They met to brainstorm on the defendant's projects including horticulture and livestock improvement and multiplication. Later, on 15th August, 2003 he was engaged by the defendant under an internal memo written by Kimetto (DW2) for the approval of the defendant's Managing Director. The document was marked for identification (i.e. P. MFI 1).

The plaintiff testified that he began his work by being asked to write a project proposal but because a feasibility study was not availed, he declined to commence the work. Instead, he was asked to carry out feasibility study of livestock improvement and multiplicity to cover four districts of the North Rift. The work commenced and upon discussion, he asked for a consultancy fee of Kshs. 720,000/- which was considered high by the defendant and had to be approved by the defendant's Managing Director. He was told that he would be paid a facilitation fee of Kshs.42,000/-. Imprest forms to that effect (P.Exh. 2) were

completed.

The plaintiff went on to testify that he drew a work plan and proceeded to the field. The work was to take 21 days and together with officials of the defendant including Fredrick Kimetto, he proceeded to the field. They first went to Marakwet District where he prepared field notes (P.Ex. 4 a-c) and four reports (P.Ex. 5a-d). He also took photographs (P.Ex.6). He produced a covering letter (P.Ex.7) and acknowledgement letter from the defendant's Managing Director (P.Exh.8). He was however not paid for the work done. He wrote letters demanding Kshs.720,000/- (P.Exh.9) but the defendant declined to pay. He saw a Minister who wrote a letter to the defendant (P.Ex.10). He also wrote to the defendant and a report was made by a John Murunga (P.Ex.11). He wrote further demand notices (P.Ex.12 and 13). The plaintiff contended that he was consulted by the defendant and was not a pretender. He beseeched the court to enter judgment in his favour for the sum of Kshs.720,000/-, plus costs of the suit.

David Biwott (DW1), a senior range management officer, testified on behalf of the defendant. He said that he was serving in West Pokot in August 2003 when he met the plaintiff. He (DW1) was carrying out a feasibility study on a livestock project and had teamed up with Fredrick Kimetto, the planning manager. He (DW1) said that he met the plaintiff but was not aware of any document allowing him (plaintiff) to do consultancy work. He (DW1) stated that the feasibility study was undertaken by himself and Fredrick Kimetto. They worked as a team and the team leader was the planning manager. After the assignment, they compiled a draft report. David (DW1) indicated that they visited several places while undertaking the assignment and that the plaintiff accompanied them although he (DW1) did not know his (plaintiff's) role. David (DW1) went on to state that there was no indication that the plaintiff was to write a report and was not aware whether the plaintiff was a contracted consultant. He (DW1) contended that the plaintiff was not entitled to the payment of Kshs.720,000/-.

The defendant's planning manager, **Fredrick Kimnetich Arap Kimeto (DW2)**, said that in August 2003, the defendant's Managing Director informed him of a planned proposal for livestock development. The Managing Director informed him (DW2) that he (DW2) would be accompanied to the field by the plaintiff who was said to be an expert. Fredrick (DW2) proceeded to the field accompanied by the plaintiff among others. They were paid night out allowance save the plaintiff who was not an employee of the defendant. He (DW2) wrote an internal memo to the defendant's Managing Director requesting for approval of the plaintiff's engagement. He (DW2) said that he co-ordinated all the programmes as a planner and that Biwott (DW1) was the specialist in livestock while the plaintiff was the expert who was to improve on the quality of written proposals.

Fredrick (DW2) confirmed that the three of them did the work and that the report was written by the plaintiff. He (DW2) submitted the report to the defendant's Managing Director. He (DW2) also confirmed that the plaintiff was paid Kshs.42,000/- for the field work and was not entitled to the amount he was claiming. He (DW2) indicated that there was no written contract for consultancy services by the plaintiff nor was there any commitment for payment of Kshs.762,000/- to the plaintiff. He said that there was no letter by the defendant for the engagement of the plaintiff and that he (DW2) would not tell how the figure of Kshs.762,000/- was arrived at. He said that on top of Kshs.42,000/- paid to the plaintiff, there should have been a token payment which was at the discretion of the defendant's Managing Director who indicated that the Kshs.42,000/- already paid was enough.

Basically, from all the foregoing evidence, it is the opinion of this court that indeed the plaintiff undertook some field engagement for the defendant and in the company of the defendant's employee to whom he was introduced as an expert for purposes of improving the writing of reports. It was confirmed by Fredrick (DW2) that the plaintiff wrote a report which was submitted to the defendant's Managing Director. It was also indicated by Fredrick (DW2) that the plaintiff was paid Kshs.42,000/- for the work done. This was not disputed by the plaintiff although his demand was for a sum of Kshs.720,000/-. There was no written contract for the plaintiff services of whatever nature. It was not

therefore established how the sum of Kshs.720,000/- was arrived at.

There was indication from Fredrick (DW2) that the plaintiff was entitled to some token amount over and above Kshs. 42,000/- but this was at the discretion of the defendant's Managing Director who declined to have the plaintiff paid over and above 42,000/- on grounds that the amount was enough. Although it is easy to sympathize with the plaintiff considering the amount of his time and skills put into the writing of project reports for the benefit of the defendant, it was incumbent upon him to prove his claim by placing before the court sufficient evidence. Unfortunately this was not the situation herein. The plaintiff may have established on the balance of probabilities that indeed, he rendered some services to the defendant. However, he did not adduce sufficient evidence to prove that he was justly and fairly entitled to the sum of Kshs.720,000/-. He did not prove that the amount was agreed or how it was arrived at. The nature of the services rendered did not matter, the amount had to be established in one way or the other by cogent and credible evidence which was lacking herein.

None of the documents tendered in evidence by the plaintiff showed that there was an agreement, express or implied, for the payment of Kshs.720,000/- to the plaintiff for services rendered. A fee structure (P.Ex.9(b)) seems to have been prepared by the plaintiff but there was nothing to suggest or prove that the same was accepted by the defendant.

The internal memo alluded to in the trial was merely marked for identification (i.e. P.MFI 1) without being formally tendered. It was therefore of no use and lacked any probative value to show that it was indeed agreed between the parties that the plaintiff would be paid the sum of Kshs.720,000/-. What clearly came out of the evidence was that the plaintiff was to be paid Kshs.42,000/- for his services and he was indeed paid the amount. Any further payment was at the discretion of the defendant's Managing Director who, it would appear, declined to exercise discretion in favour of the plaintiff. Consequently, the plaintiff filed this civil suit in which he was expected to prove on the balance of probabilities that he was entitled to a sum of Kshs.720,000/- from the defendant and not Kshs.42,000/-. However, he did not discharge his obligation by proving that the amount was agreed on or by showing that the amount was arrived at in this or the other way and with the approval and/or consent of the defendant. He simply threw the figure at the court and hoped that the court agreed with him. Indeed, the trial court agreed with him. This was erroneous as it was not open to the trial court to take at face value the figure placed before it whereas there was no evidence to establish the same.

In the circumstances, this court is inclined to interfere with the decision of the trial court subject of this appeal. In that regard, the appeal is allowed to the extent that the decision of the learned trial magistrate in which judgment was entered for the plaintiff against the defendant for the sum of Kshs.720,000/- plus costs of the suit and interest be and is hereby set aside and substituted for an order that the plaintiff's case against the defendant be and is hereby dismissed with costs. The costs of this appeal shall be borne by the plaintiff/respondent.

Ordered accordingly.

J.R. KARANJA

JUDGE

(Delivered and Signed this 8th day of March 2011 in the presence of Mr. Kwambai holding brief for Ngala for appellant and Mr. Kathili for the respondent).

Order; Certified copies of the proceedings and judgment of the court to issue to the respondents as applied).